BEFORE THE ARIZONA CORPORATION COMMISSION

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PAC-WEST TELECOMM, INC.,	) DOCKET NOS. T-01051B-05-0495
	) T-03693A-05-0495
Complainant,	)
	) **REPLY IN SUPPORT OF THE**
QWEST CORPORATION,	) **MOTION FOR SUMMARY**
	) **DETERMINATION OF**
Respondent.	) **PAC-WEST TELECOMM, INC.**
	)
	)

Pac-West Telecomm, Inc. ("Pac-West") files the following Reply in support of its Motion for Summary Determination ("Motion") of its formal complaint for enforcement of its interconnection agreement with Qwest Corporation ("Qwest"). Pac-West's reply to arguments raised by the Arizona Corporation Commission ("Commission") Staff is included in Section III below.

I. Introduction

Qwest is attempting to drive a square peg into a round hole. The peg is VNXX traffic. It is twenty-first century "telecommunications." The round hole is the intercarrier compensation system preserved for long distance dialing. Long distance, as a metric for billing, is almost a thing of the past. The evidence of our transition away from distance-sensitive consumer pricing is everywhere. Wireless phone packages, internet services, "all you can use" long distance packages, and VOIP phone service all reflect modern pricing systems that do not hinge on the distance traveled by the digital packets.

Congress anticipated and planned for this transition from the old pricing system to new systems when authoring the Telecommunications Act of 1996. As for the new systems, the Act requires all local exchange carriers ("LECs") to "establish reciprocal compensation arrangements" with one another "for the transport and termination of telecommunications." 47 U.S.C. §251(b)(5). In other words, carriers must arrange to pay one another for calls they exchange. Historic traffic compensation arrangements (such as access payments for 1+ dialing) were not abruptly discontinued under the Act. Rather, 47 U.S.C. §251(g) authorized the "continued enforcement" of the old pre-Act compensation requirements that existed as of February 8, 1996.

Qwest contends that the VNXX ISP-bound traffic at issue in this case belongs in the §251(g) category for purposes of compensation. Pac-West has argued from the inception of this matter that this is incorrect. ISP-bound VNXX traffic is "telecommunications" traffic and is properly categorized as §251(b)(5) traffic. ISP-bound VNXX traffic does not qualify for treatment under §251(g) because there were no pre-Act compensation rules for VNXX ISP-bound traffic. Because VNXX ISP-bound is not §251(g) traffic, it was compensable as 251(b)(5) traffic under the parties agreement.

Qwest and the Commission Staff both contend that the FCC *ISP Mandamus Order* does not apply "retroactively" to the ISP Amendment. This too is incorrect. The *ISP*

Mandamus Order did no more than confirm the law set forth in the *ISP Remand Order*. But even if that were not the case, FCC orders are authoritative and control in the interpretation of interconnection agreements, even if issued after an agreement is litigated.

II. ISP-Bound VNXX Traffic is Not Carved Out of the Reciprocal Compensation Regime by 47 U.S.C. §251(g).

In response to Pac-West's motion, Qwest argues principally that VNXX ISP-bound traffic is §251(g) traffic. Legally and practically, VNXX ISP-bound traffic cannot qualify for compensation under §251(g).

A. *Under WorldCom, Inc. v. F.C.C., ISP-Bound Traffic is Not 251(g) Traffic.*

Qwest contends that ISP-bound VNXX traffic is properly categorized as 251(g) traffic – meaning it is traffic that existed prior to passage of the Act and was subject to access compensation.[1] As a matter of law this is incorrect. Indeed, the argument has been raised and rejected at the highest level. Initially, the FCC did announce in the *ISP Remand Order* that ISP-bound traffic was excluded from §251(b)(5) by §251(g). The D.C. Circuit Court of Appeals, however, reversed this conclusion. *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 434 (D.C. Cir. 2002) ("*WorldCom*"). The D.C. Circuit explained in *WorldCom* that §251(g) provides only for "the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations.'" *Id.* at 432. The D.C.

[1] Initially, Qwest asserted in this proceeding only that reciprocal compensation was not owed Pac-West for VNXX ISP-bound traffic. Now, Qwest is affirmatively asserting that access charges would be due on this same traffic. Qwest has not filed a counterclaim seeking payment of access charges.

Circuit proceeded to hold that "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic." *Id.* at 433 (emphasis in original). As a direct consequence of this holding, the compensation obligation arising under §251(g) cannot apply to ISP-bound traffic. *Id.*

B. *The ISP Amendment Requires Reciprocal Compensation for 251(b)(5) Traffic.*

Qwest responds to the *WorldCom* precedent by arguing that VNXX ISP-bound traffic is not ISP-bound traffic for purposes of intercarrier compensation. Notably, Qwest does not dispute that this traffic is ISP-bound. Qwest Opening Brief, p. 2 (Sept. 14, 2005). Nor does Qwest dispute that the *ISP Remand Order* created a rate plan for ISP-bound traffic. Rather, Qwest contends that this particular ISP-bound traffic is not subject to the *ISP Remand Order* rate plan. This question – whether VNXX ISP-bound traffic is subject to the *ISP Remand Order* rate plan – need not be answered to resolve this case. The "rate election" contained in the ISP Amendment and signed by Pac-West provided that "[t]he reciprocal compensation rate elected for (251(b)(5)) traffic is . . . [t]he rate applied to ISP traffic."[2] Importantly, that rate election simply identified a rate to be applied to all §251(b)(5) traffic. The election did not limit application of the rate to ISP-bound traffic, or "local ISP-bound traffic," or any other type of ISP-bound traffic. The rate election in Section 5 of the ISP Amendment is the operative provision of the

[2] Internet Service Provider (ISP) Bound Traffic Amendment to the Interconnection Agreement between Qwest Corporation and Pac-West Telecom, Inc. for the State of Arizona, p. 3, section 5 (dated May 24, 2002, with rate election effective as of June 14, 2001) ("ISP Amendment") (Attached as Exhibit 1).

amendment and assigns a specific rate to all 251(b)(5) traffic. Because VNXX ISP-bound traffic is §251(b)(5) traffic, Qwest must pay the assigned as directed by the ISP Amendment.

When the district court reviewed the ISP Amendment and issued its order in this case (March of 2008), the *ISP Mandamus Order* had not yet been issued. Perhaps for this reason, the district court mistakenly concluded that "[t]he reciprocal compensation provisions of § 251(b)(5) apply solely to calls that originate and terminate in the same local calling area. *ISP Remand Order*, 16 F.C.C.R. at 9159, ¶13." Order at 12. The *ISP Mandamus Order* squarely rejected this analysis, instructing instead that "the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2)." *ISP Mandamus Order* para. 15.

The fact that Pac-West did not appeal the district court's order is not relevant to the Commission's resolution of this case. The *ISP Mandamus Order* is the basis for Pac-West's motion and the *ISP Mandamus Order* was not issued until long after the district court had ruled.[3]

[3] An appeal to the Ninth Circuit is a costly undertaking. Given the new FCC Order anticipated by November of 2008, Pac-West thought the most cost-effective and expeditious way to conclude this matter would be to address the impact of the *ISP Mandamus Order* in the Commission remand proceeding. In the Level 3 companion case, Level 3 chose to appeal the district court decision to the Ninth Circuit. *Qwest Corporation v. Level 3 Communications, LLC* (Ninth Cir. Case No. 08-15887).

C. *ISP-Bound VNXX Traffic Does Not Fall Within §251(g).*

Qwest argues that VNXX ISP-bound traffic is not ISP-bound traffic, but instead is akin to standard §251(g) long-distance traffic. For §251(g) to apply, however, the traffic must meet the qualification criteria for intercarrier compensation set forth in §251(g) and explained in *WorldCom*, including the requirement that a pre-Act rule or regulation exist which established an access charge for the traffic. 288 F.3d at 432-434. Although Qwest argues that this is "interexchange traffic" subject to access charges, it points to no FCC rule, regulation or order identifying VNXX ISP-bound traffic as interexchange traffic. The traffic at issue here is locally-dialed ISP-bound traffic exchanged by LECs, and at no point touches "interexchange carriers" or "information service providers." 47 U.S.C. §251(g). The ISP-bound traffic in dispute is not, as Qwest argues, just like a "1+" call to an ISP (*i.e.*, a long-distance call requiring that a 1 be dialed prior to the area code). Rather, these are locally-dialed calls that are, for all practical purposes, identical to all other local calls placed by Qwest customers. Without a pre-Act FCC regulation, rule or order stating that VNXX ISP-bound calls qualify for access charge treatment, Qwest's "interexchange" argument fails.

Second, Qwest submits that *In re Northwestern Bell Telephone Co.* supports the imposition of access charges in this case. Qwest Brief at 13-14 (citing *In re Northwestern Bell Telephone Co*., 2 FCC Rcd 5986, 5988 n.29 (1987); *vacated as moot by In re Northwestern Bell Telephone Co.,* 7 FCC Rcd 5644, (1992)). *Northwestern Bell,* however, supports the opposite conclusion. In *Northwestern Bell,* the FCC clarified that the "Talking Yellow Pages" was an enhanced service provider ("ESP") not obliged to pay interstate access charges, and confirmed that the interexchange carrier providing an interstate 800 service had to pay access charges. This situation – a pure interexchange carrier providing a tariffed interstate service – is not analogous to the delivery of VNXX ISP-bound service by a local exchange carrier. Of some relevance to this case, however, is the final footnote of *Northwestern Bell*, which explains that Talking Yellow Pages was not obliged to pay access charges even though its arrangement was "functionally very similar" to FX service. *Id.* at 5988 n.29. Here, Qwest contends that Pac-West is providing a service that is functionally equivalent to FX service, but under *Northwestern Bell,* "functionally equivalent" is not a sufficient basis for assessment of access charges under §251(g).

Qwest's argument for §251(g) compensation fails because the 1996 Act created an outright prohibition against extending access charges by analogy. Section 251(g) allows only the "[c]ontinued enforcement" of certain pre-Act obligations. The FCC intended §251(g) to operate as a "transitional device" that would preserve – but not expand – "LEC duties that antedated the 1996 Act." *WorldCom*, 288 F.3d at 430. The FCC could not, as Qwest contends, choose to extend this narrow, temporary exemption to a wholly new type of traffic by analogy.

Finally, Qwest argues that ISP-bound VNXX traffic is "like interstate FX services [and thus] subject to the FCC's access charge regime." Qwest Response at 15. For a number of reasons, this assertion is incorrect. First, as discussed above, the FCC cannot, by analogy, extend §251(g) compensation to traffic types that were not the subject of a rule, regulation or order prior to the 1996 Act. Thus, even if VNXX ISP-bound traffic were "like" pre-Act FX service, this functional equivalency would be insufficient.

Further, FX interstate traffic in early 1996 was not "like" VNXX ISP-bound traffic. FX services were typically purchased by a business for purposes of creating a local voice presence in a distant office. For example, a Phoenix business might purchase FX service for its branch office in Reno, thereby allowing local dialing between the two offices. These lines would be used heavily for voice-traffic and customer convenience. In contrast, VNXX ISP-bound traffic is the one-way, non-voice transport of digital packets destined for the internet. This traffic is different in volume and type. User expectations regarding the service are very different. An end-user of an ISP dial-up service does not care where the ISP is located or where the call is terminated, rather quick access to MapQuest, Google or Face Book is the priority. In contrast, the FX service customer intends (and has intentionally arranged) to reach out, via a local presence, to a specific pre-arranged distant location.

FX service and VNXX ISP-bound service also differ in network architecture. Prior to the 1996 Act, it was common for a user to purchase FX service from Qwest, but purchase the private line from a long-distance company. *In the Matter of Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd. 7441, 7441 n.3 (1987) (FX traffic "consists of a private line terminating at one end at the FX subscriber's premises (the 'closed end') and at the other end in a local switched exchange network (the 'open end')."). The private line could also have been purchased from Qwest. With ISP-bound VNXX service, a user need not, for any technical reason, purchase a private line for delivery of the VNXX calls. This differing network architecture was the basis for Qwest's vigorous assertion, in this case, that Qwest's FX service was incomparable to VNXX ISP-bound traffic. *See* Qwest Response Brief submitted October 19, 2005 (pages 24-28) ("Qwest's FX service is very different from VNXX"). Pac-West would agree that, for purposes of intercarrier compensation, VNXX ISP-bound service is not analogous to Qwest FX service. In summary, the 1996 Act does not allow application of §251(g) compensation mechanisms by analogy, and even if it did, Qwest's interstate FX service is not analogous to ISP-bound VNXX service.

In a final effort to shoe-horn VNXX traffic into §251(g), Qwest argues that Pac-West is functioning "as an interexchange carrier" and, thus, the §251(g) requirement that the traffic in question be exchanged between a LEC and an interexchange carrier is met. Pac-West is not an interexchange carrier. (By way of analogy, Qwest does not become an interexchange carrier when it provides intrastate FX services to a customer.) As the D.C. Circuit Court of Appeals held, a "LEC's services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP." *WorldCom* at 434. Under these facts, Qwest cannot establish that VNXX service is provided to an information service provider or an interexchange carrier, as required under §251(g).

III. *The ISP Mandamus Order* is Controlling Law.

Qwest mistakenly asserts that the doctrines of collateral estoppel and law of the case preclude the Commission from applying the *ISP Mandamus Order*, because the Order was issued after the Arizona district court issued its decision. In a proceeding certainly familiar to Qwest, however, the Ninth Circuit reached the opposite conclusion. In *US West Communications, Inc. v. Jennings*, Qwest challenged agreements that had been approved by the Arizona Corporation Commission. 304 F.3d 950, 965-57 (9th Cir. 2002) ("*US West v. Jennings*"). US West argued that the Ninth Circuit could not apply new FCC regulations that had gone into effect after the agreements had been arbitrated and approved by the ACC and had been challenged in federal district court, because it would have "an impermissible retroactive effect." The Ninth Circuit rejected US West's assertion, explaining instead that the correct approach is to "ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect when the ACC approved the agreements." *Id.* at 956. According to the Ninth Circuit, "the FCC's implementing regulations-including those recently reinstated and those newly promulgated-must be considered part and parcel of the requirements of the [Telecommunications Act of 1996]" and should be applied "to all interconnection agreements arbitrated under the Act, including agreements arbitrated before the rules were reinstated." *Id.* at 957. The Court further emphasized that such "newly promulgated regulations do not have an impermissible retroactive effect." *Id.* at 958.

US West v. Jennings has been cited repeatedly around the country for the proposition that the courts and commissions are obliged to apply the law as currently declared by the FCC. *See Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1130 n. 9 (9th Cir. 2003) (citing *US West v. Jennings*) ("all valid implementing regulations in effect . . . including regulations and rules that took effect after the local regulatory commission rendered its decision, are applicable" when interconnection agreements are reviewed); *Indiana Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 394 (7th Cir. 2004) (quoting *US West v. Jennings*) (holding that courts are "obligated" to "apply the law as it currently stands" and that the relevant FCC order currently in effect at the time the court made its decision must be applied, even though the FCC Order was issued after the state commission and federal district court had rendered decisions in the matter); *South. New England Telephone v. MCI Worldcom Comm. Inc.*, 353 F.Supp.2d 287, 290, 305 (D. Conn., 2005) ("when reviewing a [commission's] interpretation of federal law, the court applies the law in effect at the time it conducts its review, even if that was not the law in effect at the time the [commission] made its decision").

In a similar vein, the Arizona Corporation Commission staff argues that "the Commission should apply the law as it existed during the relevant periods in dispute" and that "the application of the FCC's most recent November 5, 2008 Order would not be appropriate." Staff Response at 2. For the reasons discussed immediately above, application of the FCC's most recent order is not only appropriate, it is compelled by federal law. Further, the FCC did not change its interpretation of the Telecommunications Act of 1996 in the *ISP Mandamus Order,* as asserted by Staff. In the *ISP Mandamus Order* the FCC emphasized that it was in the *ISP Remand Order* that "[t]he Commission reversed course on the scope of section 251(b)(5), finding that . . . the scope of section 251(b)(5) is limited only by section 251(g)." In the *ISP Mandamus Order* the FCC explained that, consistent with the *ISP Remand Order* "the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2)" and "traffic encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent the Commission acts to bring that traffic within its scope." *ISP Mandamus Order* para. 15.

The *ISP Mandamus Order* is the authoritative interpretation of the Act and thus supersedes the Arizona district court's previous decision and is binding on the Commission. *Auer v. Robbins*, 519 U.S. 451, 461 (1997) (When an administrative agency interprets its own regulation, that interpretation is controlling.). The assertions by Qwest and Staff to the contrary are incorrect. Because the *ISP Mandamus Order* makes clear that all telecommunications traffic is §251(b)(5) unless carved out by §251(g), Qwest must establish, as a matter of law, that this traffic qualifies as §251(g) traffic. Under *WorldCom,* and as discussed in section II(C) above, Qwest cannot establish that VNXX ISP-bound traffic qualifies for compensation under section §251(g).

IV. Conclusion

Summary disposition of this case is lawfully compelled by the *ISP Mandamus Order,* the *ISP Remand Order,* and *WorldCom.* The ISP-bound VNXX traffic terminated by Pac-West is section §251(b)(5) traffic and thus, under the ISP Amendment to the parties' interconnection agreement, the traffic was properly the subject of compensation from Qwest to Pac-West. Although Qwest contends that this is §251(g) traffic, Qwest has failed to identify a single pre-Act rule or regulation that provided compensation under §251(g) for ISP-bound VNXX traffic. In fact, no pre-Act rule or regulation proscribed intercarrier compensation for ISP-bound traffic and, consequently, no compensation may be paid under §251(g). Pac-West requests that the Commission find, as a matter of law, that Pac-West was properly entitled to compensation under the ISP Amendment and, because that compensation has now been paid, this matter may be dismissed.

RESPECTFULLY SUBMITTED this 30th day of April 2009.

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